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No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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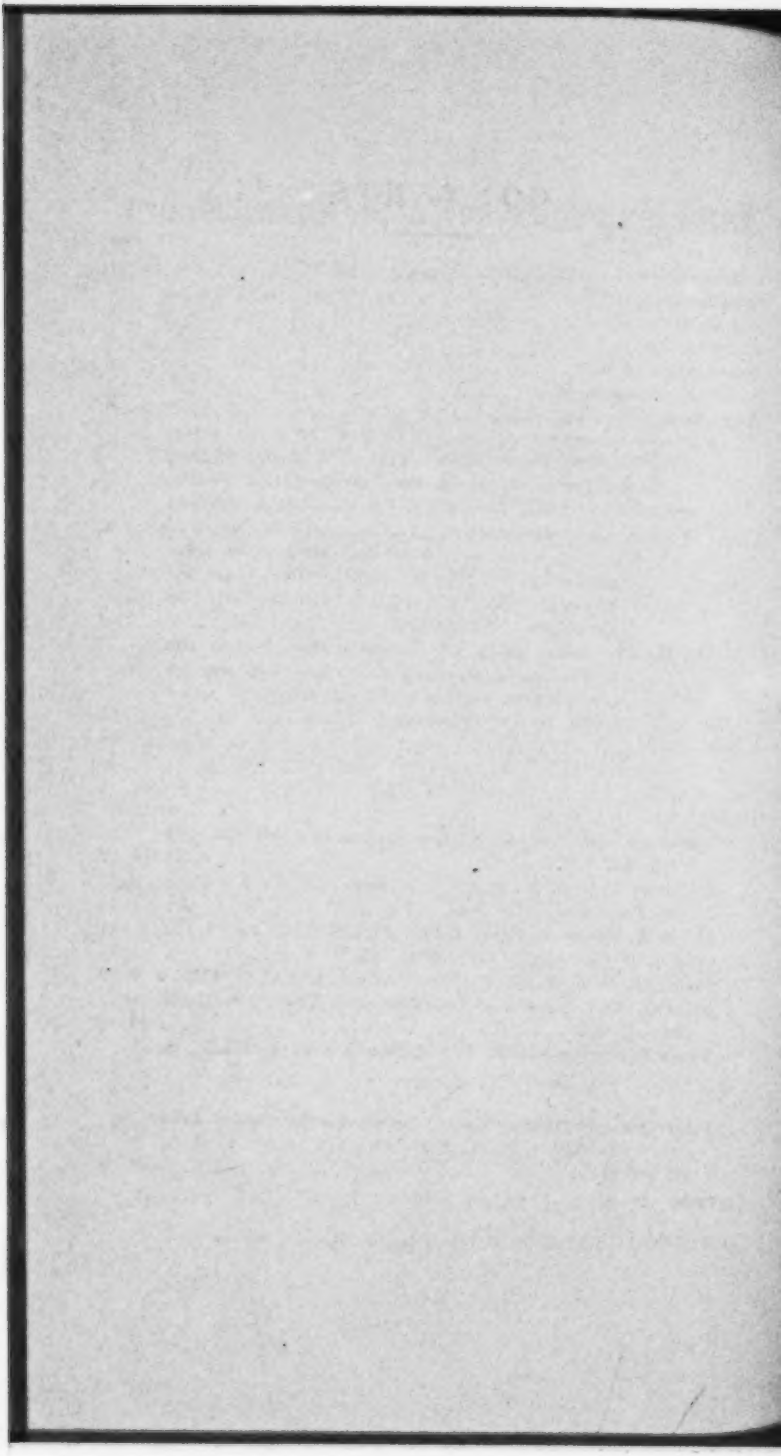

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OPINION BELOW

The opinion of the specially-constituted District Court (Circuit Judge Davis and District Judges Rellstab and Bodine) for the District of New Jersey, holding the order of the Interstate Commerce Commission (hereinafter called the Commission) to be void for lack of jurisdiction on the ground that the rates prescribed were for transportation of intrastate commerce, is reported as *Erie Railroad Co. et al.* v. *United States*, 32 F. (2d) 613, and is printed in the record at pages 26–29.

QUESTION

At Garfield, N. J., Hamersley Manufacturing Company (hereinafter called Hamersley Company) is engaged in making paper which it manufactures from imported wood pulp. It makes an offer for a certain quantity and quality of wood pulp to brokers or "mill agents" in New York, and the latter cable that offer, with offers of other customers, to a mill located in Germany or Sweden. The mill accepts by cable to the broker, who then makes a sales contract between himself and the Hamersley Company. The pulp is shipped by the foreign mill, on an ocean bill of lading, consigned to the New York broker, accompanied by a cablegram specifying the customers, including the Hamersley Company, for whom the pulp, marked according to quality, is intended. Upon its arrival at Hoboken the broker makes out a rail bill of lading upon which the pulp is transported by rail to Garfield, N. J.

The question is whether the rail transportation of this pulp from Hoboken to Garfield involves commerce of such character as to bring it within the provisions of Section 1 (1) and (2) of the Interstate Commerce Act; that is, has the Commission jurisdiction to prescribe rates to be charged by the railroads for transporting said property between those points.

THE STATUTE

The pertinent language of Section 1 of the Interstate Commerce Act as amended by the Act of February 28, 1920, c. 91, 41 Stat. 456, 474 (U. S. C. Title 49, Sec. 1) is:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (c) The transmission of intelligence by wire or wireless; —
>
> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers

and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

* * * * *

STATEMENT

The Hamersley Company alleged, in its complaint to the Commission, among other things, that the rate charged by appellees for the transportation of imported wood pulp from Hoboken, N. J., to Garfield, N. J., was unreasonable. It asked the Commission to prescribe the reasonable rate therefor, and to award reparation. (R. 15.)

Upon the testimony, and after hearing argument, the Commission found the rate to be unreasonable, prescribed a reasonable rate, and awarded reparation. (R. 12–14; 126 I. C. C. 491.)

At the second hearing appellees challenged the Commission's jurisdiction, contending that the commerce involved in the rail movement from Hoboken to Garfield was intrastate. The Commission found that the rail movement was but a continuation of the transportation begun when the shipment left the foreign mill, that there was "a continuing intent on the part of the shipper" that the pulp should be transported to Garfield, the place

of business of the purchaser, and that, therefore, the rail transportation was of the character over which it had jurisdiction. (R. 9.) It thereupon entered the order (R. 13–14) which is the subject of this suit (148 I. C. C. 47).

The court below, upon the same evidence as was before the Commission, and without indicating that it gave any weight to the Commission's findings, enjoined enforcement of the order, on the ground that "the essential character of the transaction is in intrastate and not interstate commerce," and, hence, it was beyond the Commission's jurisdiction to prescribe rates for the rail transportation. (R. 29, 30.)

The facts, in outline, concerning the financial transaction, the ocean and rail transportation, and the physical handling of the shipments are as follows:

The Hamersley Company makes an offer to a broker or mill agent at New York for certain quantities and grades of wood pulp. The brokers are "agents on commission" of the foreign mill. (R. 45, 47.) The broker communicates this offer by cable to a foreign mill, which cables its acceptance to the broker who then enters into a contract between himself and Hamersley Company. (R. 45, 46.) The contract (R. 63, 66) covers the quantity and grade of pulp to be purchased, and specifies that shipment will be made from the foreign mill at a stated number of tons per month, delivery to be made "Ex-dock New York" (meaning New York

Harbor, which includes Hoboken). The forms of contract appear at pages 63–68 of the Record.

When the pulp ordered by Hamersley Company is ready for shipment from abroad, it is placed on a steamer with pulp ordered by other customers through the New York broker, and the whole lot is covered in one ocean bill of lading with the broker named as consignee. (R. 47.) For the convenience of his customers the broker pays for the pulp before it leaves the foreign port. (R. 47.)

The foreign mill cables the broker that a certain quantity of pulp is aboard a certain steamer, specifying the customers for whom the several lots of pulp are intended. "The cables indicate what tonnage is going to Hamersley." (R. 46.) The separate bales are stamped or marked abroad to indicate the quality of the pulp, but they are not marked with the name of the customer. (R. 43, 44.)

The shipments have been going on for some years. One witness testified that from the early part of 1923 to January 1, 1928, 900 carloads were routed to the Hamersley Company by the defendant from Hoboken to Garfield (R. 74).

When the steamer arrives at Hoboken, an arrival notice is sent by the steamship company to the broker. He then furnishes the Hoboken Manufacturers' Railroad with a dock order (R. 49) and shipping instructions, namely, a bill of lading. The steamship company then delivers the pulp to the Railroad, and the quantity specified in the bill is

loaded and transported over lines of the appellees to Garfield. (R. 49, 50.)

The broker receives the shipments from the steamer, gives directions and orders for the rail transportation, and handles the entire transaction at the Hoboken dock. (R. 46.) The Hamersley Company has "nothing to do with it until the pulp arrives at Garfield." (R. 44.)

Ordinarily the pulp moves promptly from the dock to the mill at Garfield. It "goes right through from the other side, [foreign port], to the mill, frequently without interruption." (R. 42.) If an order contains a large number of bales Hamersley Company instructs the broker to distribute the rail shipments over "as many days as possible in order that we [Hamersley] may be able to unload the cars with our facilities on those days." (R. 44, 45.) The pulp may lie on the pier several days before shipping orders are given the railroad. "It takes the steamship that long to discharge, and sometimes the goods lie there for weeks" (R. 50), but it is "seldom that a shipment stays there two or three weeks for Hamersley." (R. 51).

The bales intended for the Hamersley Company when shipped from abroad are always delivered to it at Garfield and are never sold or diverted to any one else. (R. 46, 47.)

SPECIFICATION OF ERROR

The District Court erred in holding that the commerce involved in the rail transportation from Hoboken to Garfield was intrastate in character,

and in annulling and enjoining enforcement of the Commission's order on that ground.

SUMMARY OF ARGUMENT

The whole group of facts, considered and weighed together, establishes that the commerce involved is interstate or foreign in character, and subject, therefore, to the Commission's jurisdiction.

The evidence shows that Garfield, N. J., was at all times fixed in the minds of all parties as the ultimate destination of the shipments. The actual movement was continuous from the foreign mill to that destination, with only such interruption at Hoboken as was necessary for transfer from ship to cars.

Ignoring these facts, the District Court erroneously rested its decision upon the incidents of forms of contract, billing, and the point at which title to the property passed.

ARGUMENT

A Proper Consideration and Weighing of the Whole Group of Facts Compel the Conclusion that, as a Matter of Law, the Commerce Involved in the Transportation of the Imported Wood Pulp from the Pier at Hoboken to Garfield is Interstate in Character

The question whether commerce is interstate or intrastate must be determined by its essential character, and not by mere billing or forms of contract. Determination of that question is a matter of weighing the whole group of facts in respect to the com-

merce. *Atl. C. L. R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 268–269.

In *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, at page 171, this Court held:

> For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.

To the same effect is *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465–6.

Although the whole group of facts in respect of the commerce must be weighed in determining whether it is interstate or intrastate, and billing, uninterrupted movement, continuous possession by carriers and other incidents may be important evidence bearing upon the character of the commerce, the decisions of this Court, in which it has been determined that the commerce was interstate, appear to rest largely upon two facts, to which the District Court gave little, if any weight, namely, (1) a fixed intent in the minds of the parties when the movement begins that the shipments shall continue on their way until they reach some destination outside

the State in which they originated, and (2) normal movement. Normal movement does not necessarily mean continuous movement, but means movement in the course of transportation toward the intended destination, without interruption for storage, distribution, or other purely commercial reasons, though there may be interruptions of movement for convenience of the transportation agencies.

I. THE FACTS SHOW THAT FROM THE MOMENT THE SHIPMENTS LEFT THE FOREIGN MILL GARFIELD, AND NOT HOBOKEN, WAS THE INTENDED DESTINATION FIXED IN THE MINDS OF THE PARTIES

The facts already stated show that Hamersley Company's purpose and intent in purchasing the pulp is to use it in its plant at Garfield, and of this the broker is fully cognizant. Through the broker the foreign mill accepts Hamersley Company's offer, and, in its cablegram to the broker when the pulp is ready for shipment, specifies "what tonnage is going to Hamersley" (R. 46), who knows "nothing whatever of the intermediate handling" and has "nothing to do with it until the pulp arrives at Garfield" (R. 44). When the ship docks the broker promptly forwards the pulp on its way to Garfield.

Attention is also called to paragraph 4(d) (R. 64), paragraph 7 (R. 65) and paragraph 8 (R. 65) of the purchaser's contract with the broker as additional evidence that Garfield was the destination fixed in the minds of the parties when transportation began at the foreign port. Hence, the rail

transportation from Hoboken to Garfield was but a step in the course of movement from the foreign port to the destination the shipments were originally intended to reach in this country.

The weight to be given to the intent of the parties connected with the movement of commerce in ascertaining its character, although not itself determinative, has been discussed in several cases. In *La. R. R. Comm.* v. *Tex. & Pac. Ry.*, 229 U. S. 336, the Court apparently relied upon the following statement, at page 341, in reaching its conclusion that the commerce there involved was interstate or foreign:

> The staves and logs were *intended* by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans. (Italics ours.)

In *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* it was held that the transportation was intrastate, the Court saying at page 269 that:

> There is nothing to indicate that the destination of the oil is arranged for or *fixed in the minds* of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. John's River Terminal. (Italics ours.)

In *B. & O. S. W. R. R. Co.* v. *Settle, supra,* the Court disregarded practically all other incidents, such as billing and reshipment, and apparently

rested its conclusion almost wholly upon the fact that the intent of the shipper at all times was that the shipments should reach the destination outside the State in which they originated. At page 173 the Court stated that in many cases reshipments are independent intrastate movements, but said:

> The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out.

See also *Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101, 108–109.

II. THE INTERRUPTION AT HOBOKEN WAS DUE TO THE NECESSITIES OF TRANSPORTATION, AND WAS NOT FOR THE PURPOSE OF STORAGE, DISTRIBUTION OR OTHER COMMERCIAL CONVENIENCE

As occurs in connection with all import traffic moving by rail to an inland destination, the movement of the shipments in question was, of necessity, interrupted at Hoboken for such time as was required for the change from steamship to railroad cars. Customarily, the rail movement begins immediately (R. 43):

> Our pulp comes right through. They ship it right through as fast as the railroads will load it and handle it. We do not let it lay over there on the docks at all—no more that (n) what free time—time they give to allow it to remain on the docks.

When unusually large quantities of the pulp are unloaded at once from the steamer, the broker spreads the rail loadings and movements "over as many days as possible," at request of the Hamersley Company. (R. 45.) Sometimes the pulp may lie on the dock for several days (R. 50), but "it happens but seldom that a shipment stays there two or three weeks for Hamersley" (R. 51). Imported wood pulp is handled the same as other import traffic in so far as the railroads are concerned. (R. 51.)

The slight delay occurring in reshipment of the pulp was that which is always incident to all import traffic in transfer from steamer to cars.

The record contains no suggestion that Hoboken was at any time considered by any one to be the final destination of the shipments. Nor is there testimony to indicate that the shipments were stopped on the docks for storing, procuring orders, or other commercial reasons; or that there is any consumption of the pulp at Hoboken.

This Court has held repeatedly that interruptions in the movement of commerce due to necessity or convenience of the transportation agencies do not change its character from interstate to intrastate. Such was its holding in *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, in which it was determined that oil shipped by rail from points in Texas to St. Rose, Louisiana, where it was emptied into storage tanks and held awaiting either the arrival of ships in which the oil was to be exported, or the

accumulation of sufficient oil to load a waiting ship, was not subject to State taxation because the commerce was interstate or foreign in character. The rail shipments were not made on through bills of lading, but on an export rate which was lower than the domestic rate. The Court rejected the contention of the State of Louisiana that there were two separate shipments—one which ended when the tank cars arrived and were unloaded at St. Rose, and the foreign shipment which began when the oil was loaded aboard ship for a foreign port.

See also *So. Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, and *Texas & New Orleans R. R.* v. *Sabine Tram Co.*, 227 U. S. 111.

In both the *Sabine Tram case* and *La. R. R. Comm.* v. *Tex. & Pac. Ry., supra,* there were interruptions in the movement at the points of export for the purpose of transfer from railroad cars to steamships. In the latter case the carriers' tariffs allowed twenty days, without charging demurrage, for holding export shipments at the point of exportation. In both cases, the Court held that the interruptions in movement were mere incidents to transshipment and as such could not change the character of the commerce.

The facts in the case at bar refute any contention that the interruption at Hoboken was due to any reason other than the delays which are incident to the transshipment of all import traffic. Hence, such delay as occurred in reshipment from Hoboken to Garfield does not tend to establish that there were

two separate, distinct and independent movements of the commerce, nor that the delay at Hoboken was of such character or duration as to constitute a break in the continuity of movement within the decisions of this Court.

Indeed, it appears that only such interruptions as are caused by the shipper for commercial reasons or convenience of his business will change the character of the commerce from interstate to intrastate. This is made clear in *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* page 269.

Expressions in the opinion of the court below (R. 29) indicate that it practically ignored both the intent of the parties and the continuity of movement. The knowledge and intent of the foreign shipper, the broker and the Hamersley Company that the pulp was to be transported to the Hamersley Company's plant is brushed aside with the statement that the shipper has been paid for the pulp before it leaves the foreign port and the title to the pulp is in the New York broker during the ocean movement. Regardless of the fact that there is only such delay in reshipment from Hoboken as is necessary in transfer from steamer to cars, the District Court holds that "there are always two transactions," (R. 29) apparently because the title changes at Hoboken and the broker initiates the rail movement upon a new bill of lading at that point.

The decision of the District Court appears to be therefore contrary to decisions of this Court. In *Pennsylvania R. R. Co.* v. *Clark Coal Co., supra,* page 466, this Court held that "mere billing, or the place at which title passes, is not determinative;" and in *So. Pac. Terminal Co.* v. *Interstate Comm. Comm., supra,* page 527:

> It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another State, or delivered to a carrier for transportation." In *G., C. & S. F. R. Co.* v. *State of Texas,* 204 U. S. 403, the facts are different and the case is not apposite.

To the same effect is the holding in the *Sabine Tram case* and in the other decisions of this Court cited above.

The traffic here involved is but a part of the huge volume of import traffic of which there is a constant flow into this country. The particular shipments

were and are being handled at the port in the same manner as other import traffic. (R. 51.) Not only is there a lack of evidence tending to indicate that Hoboken was the final destination or point of consumption of the commerce in question, but there is also no basis for the contention that the shipments were interrupted and held on the piers at Hoboken for such purposes as those which this Court held in *Atl. C. L. R. R.* v. *Standard Oil Co., supra,* established the intrastate character of the commerce involved in that case. There the evidence indicated that no destination was fixed in the minds of the parties beyond the seaboard storage tanks, whereas in the case at bar the evidence establishes conclusively that Hoboken was not the intended destination, but, on the contrary, that Garfield was the ultimate destination fixed in the minds of the shipper, the New York broker, and the Hamersley Company. It was their intention that the shipments move through Hoboken to Garfield and the evidence establishes that the actual movement was in accordance with that intention. The shipments never came to rest (in the legal sense) at Hoboken. Nothing in the evidence shows that they were ever out of the hands of a carrier until delivered to the purchaser at Garfield, N. J. (R. 49, 53.) Application of well-established principles announced by this Court in the cases cited above compels the conclusion that the commerce involved is interstate or foreign in character, and that it was within the jurisdiction of the Commission.

CONCLUSION

The final decree of the District Court should be reversed, the injunction dissolved, and the petition dismissed.

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